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Supreme Court, U.S.

041183 MAR 1 - 2005

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No. _____

IN THE

Supreme Court of the United States

PHILIP D. OVERSTREET

Petitioner,

v.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT
CIVIL SERVICE COMMISSION

Respondent.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In addressing removal, pursuant to 28 U.S.C. § 1441(a), this Court has long held that the removal is permitted, and appropriate, in actions arising under or created by state law, so long as a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action," and so long as the action asserts "a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b).

Nevertheless, in its decision below, the United States Court of Appeals for the Sixth Circuit, *sua sponte*, declared that petitioner's allegations of Fourth Amendment violations, coupled with his claims of the existence of an unconstitutionally vague policy, the unconstitutional application of the policy, and other federal constitutional claims, did not sufficiently allege "a claim or right arising under the Constitution." 28 U.S.C. § 1441(b).

In so ruling, the Sixth Circuit flatly rejected this Court's holding in City of Chicago v. Int'l College of Surgeons, 522 U.S. 156 (1997). In light of this Court's specific holding therein, and given the Sixth Circuit's stark departure therefrom, Petitioner respectfully requests that this Court accept certiorari on the following questions:

1. When the plain language of the underlying claim alleges federal constitutional violations, and when the District Court has specifically concluded that the petitioner clearly raised federal questions, does a decision of the Sixth Circuit Court of Appeals concluding that the removal was improper, and concluding that petitioner's inclusion of constitutional violations was insufficient, conflict with and undermine the Congressional intent pertaining to removals, as well as this Court's clear holding in City of Chicago v. Int'l College of Surgeons, 522 U.S. 156 (1997)?

2. Assuming that the district court did lack subject matter jurisdiction, as held by the Sixth Circuit Court of Appeals, did the district court maintain the ability to sanction an offending party's misconduct by and through an award of attorneys' fees entered prior to the determination that the district court lacked subject matter jurisdiction?

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Philip D. Overstreet (appellee below), and respondent Lexington-Fayette Urban County Government Civil Service Commission (appellant below).

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IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP D. OVERSTREET

v. *Petitioner,*

LEXINGTON-FAYETTE URBAN
COUNTY CIVIL SERVICE COMMISSION

Respondent.

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP D. OVERSTREET, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This matter arose as an administrative appeal of a local governmental entity's disciplinary action imposed against a public employee. The administrative appeal was brought before the Fayette County Circuit Court in Lexington, Kentucky, [Appx. 33a], and was removed by the Respondent herein to the United States District Court for the Eastern District of Kentucky, based upon certain of Petitioner's claims "arising under the Constitution of the United States." The District Court for the Eastern District of Kentucky denied remand based upon the sufficiency of the constitutional allegations. [Appx. 27a]. On March 10, 2003, the District

Court issued an Opinion and Order granting Summary Judgment in favor of Petitioner on his state and federal constitutional claims. [Appx. 9a; 16a]. By separate Order entered on May 29, 2003, the District Court sanctioned the Respondent for its continued refusal to abide by the District Court's Orders. [Appx. 17a; 26a]. The Respondent took an appeal from the District Court's decisions to the Court of Appeals for the Sixth Circuit.

The unpublished decision rendered by the Sixth Circuit Court of Appeals, [Appx. 1a], is in direct conflict with this Court's prior decisions addressing nearly identical circumstances.

In awarding Judgment to Petitioner, the District Court properly concluded that the LFUCG Commission's arbitrary and capricious actions deprived Petitioner of a fair hearing and thus violated his Constitutional due process rights. [Appx. 9a; 16a]. The District Court then properly awarded Petitioner's attorney's fees and costs as the prevailing party under 42 U.S.C. § 1988(b). [Appx. 17a; 26a]. The District Court further concluded that an award of fees and costs was also appropriate as a sanction because of the Commission's recalcitrant conduct in contravention of the court's Orders. [Appx. 19a].

On October 28, 2004, the Court of Appeals for the Sixth Circuit refused to address the merits of the claims presented, and instead determined *sua sponte*, that the district court lacked subject matter jurisdiction over Petitioner's federal constitutional claims and pendent state law claims, reversed the District court and remanded the matter to state court. [Appx. 1a]. Petitioner's Petition for Rehearing was denied on December 1, 2005. [Appx. 8a].

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District

Court for the Eastern District of Kentucky is found in 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant Constitutional provisions herein include the Fourth and Fourteenth Amendments to the United States Constitution and federal due process.

STATEMENT OF THE CASE

Petitioner, Philip D. Overstreet [hereinafter ["Overstreet"] is a Kentucky resident and an employee of the Lexington-Fayette Urban County Government [hereinafter "LFUCG"], a local governmental entity. Overstreet was suspended for his alleged failure to sign a Property Disclosure Form. Overstreet immediately requested a hearing before the LFUCG Civil Service Commission [hereinafter "Commission"]. However, prior to the hearing on February 7, 2000, Overstreet, in order to establish that he was singled out for disciplinary treatment, requested leave to bring forth similarly-situated individuals who had failed to turn in their disclosure form on time. This request was denied, and the Commission limited Overstreet to only eight witnesses and 90 minutes to present his entire case.

At the hearing, Overstreet's request for additional time to bring forth witnesses and present evidence was flatly denied, as was Overstreet's oral request to proffer additional evidence to the Commission for purposes of appeal. Overstreet also demonstrated that the Commission further reduced Overstreet's time allocation by allowing Overstreet 1 hour and 9 minutes instead of the 1 hour and 30 minutes to which he was minimally entitled. During the hearing, Engineering Manager Steve

Farmer and Chief Administrative Officer Kenneth Kerns acknowledged that there had been no determination made as to what "properly filled out" was to mean, and that there was confusion among LFUCG officials in that regard.

Following the hearing, on February 8, 2001, Overstreet filed a formal Motion with the Commission to allow a Proffer of Evidence, based upon an inability to present adequate evidence in light of the unconstitutional time constraints set forth by the Commission. Unfortunately, however, the Commission ignored Overstreet's request and issued an Order on February 9, 2001, upholding the LFUCG's disciplinary actions.

Upon receipt of the Commission's Opinion and Order, Overstreet filed a timely Petition of Appeal with the Fayette Circuit Court on or about March 2, 2001, claiming that the actions of the Commission were unconstitutional, arbitrary and capricious, and failed to provide Overstreet with adequate due process. [Appx. 33a]. On that same date, Overstreet, in compliance with Kentucky Revised Statutes Chapter 67A, filed a formal Request for Transcript with the Civil Service Commission.

On March 21, 2001, the Commission filed a Response to the Petition, and on March 28, 2001, filed a Notice of Removal of Overstreet's Petition to the United States District Court, Eastern District of Kentucky. The District Court rejected Overstreet's Motion to Remand in accord with this Court's ruling in City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997). [Appx. 29-30a].

Over the next two years, the Commission continuously failed to comply with the District Court's repeated Orders that the Commission furnish a certified transcript of all of the proceedings.

On March 10, 2003, the District Court entered an Order declaring that the Commission's actions in upholding the LFUCG's suspension of Overstreet were arbitrary and capricious, [Appx. 9a], and that the Commission's actions resulted in a further deprivation of Overstreet's due process and Constitutional rights. [Appx. 9a]. Judgment was entered in Overstreet's favor. [Appx. 16a].

By Order dated May 29, 2003, the District Court reaffirmed its Judgment in Overstreet's favor and granted Overstreet, as the prevailing party, the sum of $30,573.20 in attorney's fees and costs pursuant to his Petition for Fees and Costs. [Appx. 17a; 26a]. The Commission appealed this ruling to the Sixth Circuit.

The Sixth Circuit Court of Appeals refused to address the merits of the Commission's appeal, concluding *sua sponte* that the District Court lacked subject matter jurisdiction despite Overstreet's Petition alleging constitutional violations and his inclusion of claims arising out of a constitutional due process violation, set aside the Judgment and award of attorneys' fees, and remanded the matter back to the state court. [Appx. 1a]. Overstreet's Petition for Rehearing was rejected by the Sixth Circuit. [Appx. 8a]. The within Writ follows.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT COURT'S DECISION, HOLDING THAT THE PETITION'S CONSTITUTIONAL ALLEGATIONS WERE NOT SUFFICIENT FOR FEDERAL SUBJECT MATTER JURISDICTION, IS IN DIRECT CONTRADICTION TO THIS COURT'S HOLDING IN CITY OF CHICAGO V. INTERNATIONAL COLLEGE OF SURGEONS, 522 U.S. 156 (1997).

In City of Chicago v. International College of Surgeons, 522 U.S.156 (1997), this Court "granted certiorari to address whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of federal district courts." Id. at 163. In holding that such a claim is properly within the jurisdiction of the federal district courts, this Court held:

> Because this is a federal question case, the relevant inquiry is not, as ICS submits, whether its state claims for on-the-record review of the Commission's decisions are "civil actions" within the "original jurisdiction" of a district court: The District Court's original jurisdiction derives from ICS' federal claims, not its state law claims. Those federal claims suffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal. § 1441(a).

Id. at 166.

In the within matter, Overstreet filed a Petition seeking, *inter alia*, protection from the unconstitutional actions taken both by the LFUCG in instituting disciplinary action against Overstreet ***and*** by the Commission's failure to provide Overstreet with constitutional due process in the review of the disciplinary actions. See Appx. 33a. The Commission removed the matter to federal court, asserting that Overstreet's petition was "an action founded on a claim or right arising under the laws of the United States." Notice of Removal at 2.

The district court rejected Overstreet's request to remand, stating "in addition to the allegations that the respondent violated the Fourth Amendment, petitioner also complained in

paragraph seven of his petition that the policy under which he was disciplined was unconstitutionally vague and unconstitutional as applied. Moreover, the petitioner complained that the Commission 'refused to pass' on the constitutionality of the policy under which the petitioner was disciplined." [Appx. 28a]. The district court continued, stating:

> Here, it is clear that the petitioner's complaint raises both state law questions and federal law questions. As stated, the petitioner's state court complaint raises express claims based upon the Fourth Amendment, and at least implicitly raises other federal constitutional claims. It is true, as the petitioner asserts, that the federal constitutional claims were raised by way of a cause of action created by state law []. *Cf.* City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 164 (1997). However, a federal question exists when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." Id. (*quoting* Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936)). The petitioner expressly averred the federal constitutional claim presented here; thus, regardless of the well-pleaded complaint rule, there is no question that federal law is an essential element of the plaintiff's cause of action.

[Appx. at 29a]. The district court further held, "[i]t is clear that both the petitioner's federal and state claims derive from the same decision by the respondent to suspend the petitioner," *citing* Int'l College of Surgeons, supra 522 U.S. at 164. [Appx. at 30a.] "[T]he petitioner's Fourth Amendment claim ***clearly*** 'arises under the Constitution' and provides a sufficient basis for this Court's original jurisdiction over the petitioner's federal and state law claims." [Appx. 31a.] [Emphasis added.]

Despite the clarity of the district court's ruling, and despite

the fact that the Commission argued vigorously that the federal court had subject matter jurisdiction, the Sixth Circuit, *sua sponte*, declared that petitioner's claims alleging violations of his Fourth Amendment constitutional rights, his due process rights, and the unconstitutionality of the policy under which he was disciplined, were somehow insufficient to trigger federal subject matter jurisdiction. Such a determination is wholly without merit, contradicts this Court's rationale set forth in Int'l College of Surgeons, and subverts the entire purpose of the removal statute, 28 U.S.C. § 1441. *Certiorari* to the Sixth Circuit Court of Appeals is therefore necessary in order to assure uniformity among the Circuits and conformity to this Court's mandates pertaining to post-deprivation review by federal district courts of state administrative appeal claims asserting constitutional violations.

II. THE SIXTH CIRCUIT COURT'S CONCLUSION THAT A DISTRICT COURT LACKS JURISDICTION TO ISSUE SANCTIONS AGAINST A PARTY THAT CONSISTENTLY IGNORES ORDERS OF THE COURT IS CLEARLY ERRONEOUS.

Assuming, *arguendo*, that the Sixth Circuit Court of Appeals was correct in declaring that petitioner's claims alleging violation of his Fourth Amendment rights and the unconstitutionality of the underlying policy somehow fail to meet the "arising under the Constitution" standard required for removal, the Sixth Circuit's decision to set aside the district court's award of sanctions against the Commission is clearly erroneous and contrary to this Court's long-standing mandates pertaining to the ability of a federal court to control its courtroom – even without proper subject matter jurisdiction. Unquestionably, federal district courts maintain jurisdiction during the interval between removal and remand to issue sanctions, costs, or fees, against a party who improperly

removes a matter, or otherwise engages in misconduct, notwithstanding an ultimate determination that the district court lacks jurisdiction. See, e.g., 28 U.S.C. §1447(c). In fact, as set forth by the Ninth Circuit, a court even has the authority to enter default judgment in a matter where it is later determined that the court lacked jurisdiction. Allen v. Exxon Corp. (In re: The Exxon Valdez), 102 F.3d 429, 431 (9th Cir. 1996)(default judgment imposed as discovery sanction is enforceable ***even if it is later determined that the court lacks jurisdiction***).

A district court has the inherent power to sanction a party when that party exhibits bad faith, including the party's refusal to comply with the court's orders. Chambers v. Nasco, Inc., 501 U.S. 32, 43-50 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980); Ray A. Scharer & Co. v. Plabell Prods., Inc., 858 F.2d 317, 320-21 (6th Cir. 1988); Shipman v. Int'l Union of Operating Eng'rs, Local 18, 744 F.2d 1226, 1230 (6th Cir. 1984)(*en banc*). Moreover, Fed. R. Civ. P. 37(c)(1) expressly authorizes a district court to impose monetary sanctions on a party for a refusal to obey a discovery order. If such provisions are emaciated by a subsequent determination of a lack of subject matter jurisdiction, the orderly process of the court system would be turned on its proverbial head.

In the case here under review, the District Court sanctioned the conduct of the Commission after the Commission repeatedly and blatantly ignored the district court's mandates. In fact, in addressing the egregious nature of the Commission's misconduct, the District Court expressly stated that "the record in this action is replete with demonstrations of the unwillingness or inability of the [Commission] to furnish a complete transcript for this Court to review... the LFUCG then chose to ignore this Court's Order in the ensuing months, needlessly adding to the delay and cost of this litigation ... The LFUCG's actions effectively prevented the proper application of corrective judicial process." [Appx. 19a]. After addressing

the various acts of misconduct, the District Court expressly concluded that, even assuming, *arguendo*, that the Court would have ruled in favor of Defendant, "the judgment in this case [i.e., the award of attorneys' fees] is justified as a discovery sanction for the [Commission's] repeated and documented refusal to comply with this court's orders." Id.

It is axiomatic that a federal district court maintains the ability to issue sanctions against an offending party until such time as it is determined that the district court lacks jurisdiction. To hold otherwise would undermine the entire ability of the district court to enforce its rules and would lead to chaos in the court system. Parties, believing that no jurisdiction exists, could ignore the mandates of a given court with impunity, relying upon a higher court to declare that no jurisdiction existed and thus obviate all liability for their misconduct.

In the case at bar, the Commission, after continuously ignoring the district court's orders, and refusing to comply with its mandates, was sanctioned. Assuming, *arguendo,* that the Sixth Circuit Court of Appeals is correct in declaring that the district court lacked subject matter jurisdiction over petitioner's claims arising under the United States Constitution, the District Court's imposition of attorneys' fees and costs against the Commission was still entirely proper, and the Sixth Circuit's holding is contrary to this Court's rulings in Chambers v. Nasco, Inc., 501 U.S. 32, 43-50 (1991), and Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-66 (1980).

Certiorari must be issued to the Sixth Circuit Court of Appeals so as to ensure that federal district courts maintain the ability to sanction offending parties prior to a subsequent determination that the federal court lacks proper jurisdiction.

CONCLUSION

WHEREFORE, Petitioner PHILIP D. OVERSTREET respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to ensure consistent treatment of the removal to federal court of state court administrative processes alleging violations of the United States Constitution and to afford district courts the ability to control parties' conduct.

Respectfully submitted,
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Dated: March 1, 2005

APPENDICES

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 03-5851

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP D. OVERSTREET	)
Plaintiff-Appellee	)
	)
V.	)
	)
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION,	)
Defendant-Appellant	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: MARTIN, COLE, and GIBBONS, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellee Philip D. Overstreet was disciplined in the form of a written reprimand and a seven day suspension without pay by his employer, defendant-appellant Lexington-Fayette Urban County Government ("LFUCG"), for failing to satisfactorily fill out a real property disclosure form. Overstreet appealed

the disciplinary action to the LFUCG Civil Service Commission ("Commission"), pursuant to Kentucky Revised Statute § 67A.280. The Commission affirmed the disciplinary action. Overstreet appealed the Commission's ruling pursuant to Kentucky Revised Statute § 67A.290 on March 2,2001, in Fayette County Court, asserting that the Commission's decision was arbitrary and that his constitutional rights had been violated. The Commission responded and removed the action to the United States District Court for the Eastern District of Kentucky on March 28, 2001. The district court reversed the Commission's ruling, concluding that (1) the Commission's actions were arbitrary; (2) the Commission had violated Overstreet's procedural due process rights; and (3) Overstreet was entitled to attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b). The Commission appealed these rulings on June 26, 2003.

We decline to reach the merits of this appeal, for we find that Overstreet's appeal was improperly removed, as the federal claims raised were not sufficiently substantial to support federal question jurisdiction. Accordingly, we vacate the judgment of the district court and remand with instructions to remand the case back to the state court of origin.

I.

On October 16, 2000, LFUCG issued a revised policy requiring employees in certain divisions to disclose their own as well as their family's real property holdings in Fayette County, Kentucky. The policy was developed as a tool to enable LFUCG to avoid conflicts of interest between LFUCG employees' ownership interests and their roles as government inspectors.

Overstreet was employed in LFUCG's Engineering Division and was among the employees required to fill out the real property disclosure form. He received a form with instructions to complete it by November 1, 2000. Overstreet returned the form by the requested date, filling out only his name, division, and employee number, and attaching a notarized statement to the otherwise blank form which stated that the information was a matter of public record and could

be so obtained if desired. In response, LFUCG disciplined Overstreet in the form of a written reprimand and instructed him to complete the form. Overstreet failed to do so and as a result was disciplined in the form of suspension without pay for seven days. Overstreet appealed LFUCG's decision to discipline him to the LFUCG Civil Service Commission. The Commission held a hearing on the merits of Overstreet's challenge on February 7, 2001 and issued a written Opinion/Order on February 9, 2001 upholding the disciplinary actions.

Overstreet appealed the finding of the Commission by filing a Petition of Appeal with the Fayette Circuit Court pursuant to Kentucky Revised Statute § 67A.270 on March 2, 2001. In his petition, Overstreet asserted that the Commission's findings were arbitrary. Overstreet also claimed that the Commission erred in failing to consider the constitutionality of the policy, an assertion which the district court interpreted as a challenge to the policy on the ground that it was unconstitutionally vague. Finally, Overstreet alleged that the Commission's decision violated his Fourth Amendment rights. The Commission filed a response on March 21, 2001 and filed a Notice of Removal to federal district court on March 28, 2001.[1]

On March 10, 2003, the district court issued an opinion and order granting Overstreet's motion for summary judgment on the ground that the Commission's decision to uphold the disciplinary action taken against Overstreet was arbitrary in violation of Kentucky state law and thus warranted reversal. Although the district court acknowledged the Fourth Amendment and unconstitutional vagueness claims alleged in Overstreet's petition in presenting the

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[1] During this time, Overstreet was also litigating the constitutionality of the disclosure policy in federal district court in a companion case brought against LFUCG. In that case, Overstreet sought a declaratory judgment, an injunction, and damages due to the policy's alleged violations of his Third, Fourth, Fifth, Ninth and Fourteenth Amendment rights.

procedural posture of the case, the district court declined to address either of these claims on the merits, failing to mention the claims again in the opinion. The court additionally found that the Commission's "unwillingness or inability" to provide a complete transcript of the Commission hearing to the court for review prevented meaningful post-deprivation review, thus violating Overstreet's procedural due process rights.[2] As a result, the district court set aside the Commission's decision and awarded Overstreet $3,860.00 in costs due to the transcript delay. On May 29, 2003, the district court issued another order denying the Commission's motion to alter or amend the judgment, and awarding Overstreet a total of $30,573.20 in legal fees pursuant to 42 U.S.C. § 1988(b) as the prevailing party in a civil rights action. The Commission filed a Notice of Appeal on June 26, 2003.

II.

Each federal appellate court has the obligation to ensure not only that there is a proper jurisdictional basis to hear the case before it, but also that a proper jurisdictional basis existed in the district court below. *Nationwide Mut. Ins. Co. v. Cisernos,* 52 F.3d 1351, 1361 (6th Cir. 1995); *Thomas v. St. Luke's Health Sys., Inc.,* 869 F. Supp. 1413, 1424 (N.D. Iowa 1994). "[A] federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz,* 536 U.S. 622, 628 (2002). The question of subject matter jurisdiction may be raised at any time, whether at the suggestion of the parties or *sua sponte* by the court. *Von Dunser v. Aronoff,* 915 F.2d 1071, 1074 (6thCir. *1990);Traficant v. United States,* No. 4:02CV188, 2002 WL 553724, at *1 (N.D. Ohio Feb. 1, 2002). We must examine whether federal subject matter jurisdiction existed in this case from the outset, as we may not rule on the merits of a case over which the district court lacked such jurisdiction. *Grable & Sons Metal Prods., Inc. v. Darue Eng 'g & Mfg.,* 377 F.3d 592, 594 (6th Cir. 2004). In examining the

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[2] A procedural due process claim had never been alleged by either party.

propriety of the removal, we must bear in mind that removal statutes are strictly construed against removal, such that doubt should be resolved in favor of remand. *See Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100,108-09 (1941); *Libhart v. Santa Monica Dairy Co.,* 592 F.2d 1062, 1094 (9th Cir. 1979).

In the present case, the Commission removed Overstreet's appeal of the disciplinary action to federal district court pursuant to 28 U.S.C. § 1441 (a) and (b). A defendant may remove to federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). District courts have original jurisdiction over "all civil actions arising under the Constitution ...." *Id.* § 1331. Whether a claim presents a federal question is determined by looking to "'the plaintiffs statement of his own claim.'" *Grable & Sons Metal Prods., Inc.,*377 F.3d at 594 (quoting *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914)). In Overstreet's initial petition, he stated that the Commission's decision violated his Fourth Amendment rights. Overstreet also alleged that the Commission failed to consider whether the disclosure policy was appropriate or constitutional. The district court interpreted this reference to constitutionality in Overstreet's petition as an allegation that the policy was unconstitutionally vague. The district court also noted that the Commission had ruled in a January 25, 2001 prehearing order that it would not review the federal constitutional issues raised in the companion case pending before the district court. In the companion case, Overstreet similarly asserted a violation of his Fourth Amendment rights, and had also asserted that LFUCG's disclosure policy was unconstitutionally vague. The key question is whether these allegations, asserted in the context of an appeal from the LFUCG Commission finding pursuant to a state statute, are sufficient to establish a federal question, such that removal pursuant to 28 U.S.C. § 1441 was appropriate. We hold that they are not, and thus, removal to federal court was not warranted.

The federal question appearing on the face of the

pleading must have sufficient substance to confer subject matter jurisdiction on the court. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Subject matter jurisdiction is lacking where the claim presented in the pleading is "plainly unsubstantial." *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103,105 (1933). A federal question asserted by a party may be plainly unsubstantial where it is obviously lacking in merit. *Id.* A federal court may remand a case *sua sponte* where the allegations of the complaint which gave rise to the federal jurisdictional basis are insufficient to confer subject matter jurisdiction on the court. *Franzel v. Kerr Mfg. Co.,* 959 F.2d 628, 629-30 (6th Cir. 1992).

Although in this case, the petition did allege constitutional violations, we do not find these allegations to be sufficiently substantial to support federal question jurisdiction. The case before us is essentially an appeal from the Commission's review of a local county government decision. At the heart of the appeal is a question of whether the Commission's findings were arbitrary, an inquiry governed exclusively by Kentucky state law. The constitutional allegations summarily asserted by Overstreet in the petition cannot be viewed as possessing the requisite substantiality to confer federal question jurisdiction upon this court or the district court below. It is indicative of the substantiality of Overstreet's constitutional claims that the district court did not address the merits of those claims in any discernible fashion in its opinion, aside from noting in the procedural posture of the case that such claims had been alleged in Overstreet's original petition. Furthermore, the constitutional violations alleged in this action were similarly alleged before the federal court in Overstreet's companion case, which was pending before the district court prior to the Commission's removal of this case to the same federal district court. There was no justifiable basis to treat the present case as sufficiently raising a federal question substantial enough to provide for a basis of removal, particularly where another action was already pending in the federal district court in which Overstreet's allegations of constitutional violations would be adequately addressed. The case at bar, presenting in substance and in fact exclusively

issues of state law, should have been remanded to state court.[3] *Cf. United Mine Workers,* 383 U.S. at 726 (noting that federal courts should avoid "[n]eedless decisions of state law").

It is incumbent upon a federal court to review its own jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears .. .that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Avitts v. Amoco Prod. Co.,* 53 F.3d 690, 693 (5th Cir. 1995) (citing rule 12(h)(3)); *Thomas,* 869 F. Supp. at 1425 ("The federal courts have a duty to examine the substantiality of the federal claim throughout the litigation, and must dismiss all claims... for want of a federal question" where the federal claim "proves patently meritless"). As noted above, the district court did not base any portion of its decision on the allegations of constitutional violations. Ostensibly, the lack of attention the district court paid to these allegations indicates that the court found them to be lacking in merit; at this point, exercising jurisdiction over the claim was no longer appropriate. *See* Fed. R. Civ. P. 12(h)(3). Thus, the district court was required to remand the case, "improvidently removed without jurisdiction," back to state court. 28 U.S.C. § 1447(c); *Farris v. Youngblood,* 248 F. Supp. 598, 599 (E.D. Term. 1965).

III.

For the foregoing reasons, we vacate the district court's opinion and remand with instructions to remand the case to Kentucky state court.

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[3] Although the district court did ultimately hold that a procedural due process violation arose from the failure of the Commission to produce a complete transcript of the Commission hearing, this issue was not alleged in Overstreet's petition and therefore cannot form the basis for creating subject matter jurisdiction in federal court. *See Long v. Bando Mfg.,* 201 F.3d 754, 758 (6th Cir. 2000); *In re Carter,* 618 F.2d 1093, 1101 (5th Cir. 1980) ("It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed.").

Case No. 03-5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

PHILIP D. OVERSTREET

Plaintiff - Appellee

v.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION

Defendant - Appellant

BEFORE: MARTIN, COLE AND GIBBONS, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellee,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 01-140-KSF

PHILIP OVERSTREET PETITIONER

v. OPINION & ORDER

LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT RESPONDENT

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The following motions are before the Court: petitioner's motion for costs [DE #36]; respondent's motion for summary judgment [DE#42]; petitioner's objections to evidence [DE #55]; petitioner's motion for summary judgment [DE #57]; petitioner's motion for extension of time [DE #62]; petitioner's objections [DE #71]; petitioner's cross-motion for summary judgment [DE #74]. The motions are fully ripe for review.

I. FACTUAL & PROCEDURAL BACKGROUND

The petitioner employee of the Lexington-Fayette Urban County Government ["LFUCG"] was suspended for his alleged failure to properly execute a Property Disclosure Form. The LFUCG Civil Service Commission ["Commission"], on February 7, 2001, determined that the petitioner's suspension was appropriate. The petitioner filed an appeal on March 2, 2001, with the Fayette Circuit Court for a determination as to whether the Commission's action was arbitrary and capricious under Kentucky law. The respondent filed a response on March 21, 2001, and subsequently filed a notice of removal on March 28, 2001.

The petition in Fayette Circuit Court contains Kentucky state law claims pursuant to K.R.S. 67A.290, requesting a review of the Commission's opinion/order of February 7, 2001. The petitioner also alleges that both the LFUCG and the

Commission violated his rights under federal law. Paragraph ten of the petition seeks reversal of the Commission's opinion/order on grounds that both the discipline issued to petitioner by LFUCG and the Commission's opinion/order affirming the discipline constituted violations of his Fourth Amendment rights under the United States Constitution.

In addition to the allegations that the respondent violated the Fourth Amendment, petitioner also complained in paragraph seven of his petition that the policy under which he was disciplined was unconstitutionally vague and unconstitutional as applied. Moreover, the petitioner complained that the Commission "refused to pass" on the constitutionality of the policy under which the petitioner was disciplined. The petitioner is specifically referring to the Commission's prehearing order of January 25, 2001, in which the Commission declined to review legal and constitutional issues pending in this Court raised in a companion case, *Overstreet, et. al. v. Lexington-Fayette Urban County Government,* United States District Court, Eastern District of Kentucky, Civil Action No. 00-460.

In the companion case brought by the petitioner, he challenged the constitutionality of LFUCG's policy under the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Moreover, in the companion action, the petitioner filed a motion for a temporary restraining order seeking to restrain LFUCG from disciplining him further for failure to comply with its policy, arguing that the policy constituted an unreasonable search in violation of the Fourth Amendment to the United States Constitution. This Court overruled petitioner's motion for a temporary restraining order, and he subsequently filed a notice of appeal to the Sixth Circuit Court of Appeals and a motion for an injunction pending appeal. The Sixth Circuit Court of Appeals granted the motion in part, enjoining LFUCG from initiating administrative charges for the petitioner's dismissal during the pendency of the appeal. The Sixth Circuit affirmed this Court's denial of Overstreet's motion in an opinion issued September 30, 2002.

II. ANALYSIS

A. Motion for Costs

In compliance with the Court's August 8, 2002 Order, the petitioner has submitted a statement reflecting charges of $5,125 associated with the discovery dispute, consisting of 25.3 hours of attorney time billed at $200 per hour and 1.3 hours of paralegal time billed at $50 per hour.

As an initial matter, the general request for attorney's fees is proper in that the Court contemplated in the August 8 Order that attorney's fees are included within the larger category "costs." In similar fashion, the Order awarding "costs associated with the motion for judgment" necessarily includes fees incurred in response to the respondent's improper motion for protective order. Time billed responding to the protective order is "associated" with the motion for judgment because both the response to the protective order and the motion for judgment were necessitated by the respondent's improper protective order and dilatory conduct in failing to comply with the Court's March 1, 2002 Order. The respondent's objections all relate to time reasonably incurred due to the discovery dispute, and are therefore overruled.

The petitioner has not submitted affidavits reflecting the prevailing local rates for this type litigation or the skill and experience level of the attorneys requesting fees. Therefore, the Court shall award a mid-range fee of $150 per hour based upon the Court's familiarity with the prevailing local rate. *See. e.g., Dixie Fuel Co. v. Callahan,* 136 F.Supp. 2d 659, 666 (E.D. Ky. 2001).

Accordingly, the Court shall award the petitioner a total of $3,860.

B. Motions for Summary Judgment

1. Summary Judgment Standard

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c); *see Celotex Corp. v. Catrett,* 477 U.S.

317 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden,* 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.,* 8 F.3d 335, 340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

2. Discussion

The standard of review for this Commission decision, as acknowledged by the LFUCG, is whether the Commission's Opinion/Order was arbitrary or "clearly unreasonable." *Crouch v. Police Merit Board,* 773 S.W.2d 461, 463-64 (Ky. 1989). An arbitrary or clearly unreasonable decision in this context is one unsupported by substantial evidence. *Id.* at 464 (quoting *Thurman v. Meridian Mutual Ins. Co.,* 345 S.W.2d 635, 639 (Ky. 1961)). "To determine arbitrariness, the appellate court may review the record, the brief, and any other evidence or testimony which would be relevant to that specific limited issue." *Id.* at 464.

The LFUCG further sets forth the relevant Kentucky law governing the parameters for permissible discipline of Overstreet: "The grounds of suspension or reprimand under this subsection shall be only those set out by comprehensive plan or ordinance." *Respondent's Reply to Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment,* p. 6 (citing K.R.S. § 67A.310). Respondent acknowledges that petitioner was not disciplined for the failure to timely file a form, but was disciplined as insubordinate for not "properly filling out the form." *See id.,* p.2.

Overstreet was initially disciplined for failing to sign and submit the Property Disclosure Form. Engineering Section Manager Steve Farmer later admitted that this initial discipline was due to his mistaken belief that Overstreet was insubordinate by not signing and turning in the disclosure form. Farmer later issued a memorandum to Overstreet directing him to not only sign the Property Disclosure Form, but to fill it out correctly. Farmer confirms that neither Chief Administrative Officer Kerns nor any other LFUCG official had determined what "properly filled out" was to mean.

Kerns further agreed that the law department and management team should have gotten together and determined what is a properly filled out form before the decision was made to discipline Overstreet. *See Petitioner's Memorandum in Opposition to Respondent's Motion for Summary Judgment, p. 22.* The record reveals confusion among officials, including disagreement between Farmer and Kerns as to what constituted a properly filled out form. Accordingly, the LFUCG was acting without a comprehensive, well-defined plan in disciplining Overstreet. The Commission concluded that the form was "relatively simple and detailed" and that Overstreet's submission constituted a "clear refusal to comply and submit the form as requested, thus insubordination." There is clearly a lack of substantial evidence supporting the Commission's findings to discipline Overstreet because of the lack of a comprehensive plan and definition of the accepted procedure for properly filling out the form.

In addition to the above Kentucky standards for review of

the administrative decision, federal procedural due process standards define the minimum level of notice and opportunity to be heard required for proper discipline of Overstreet as a government employee. This action was removed to federal court in March 2001. After various delays, on March 1, 2002, the Court ordered the respondent to furnish a transcript of the Overstreet hearing within two weeks. The record in this action is replete with demonstrations of the unwillingness or inability of the respondent to furnish a complete transcript for this Court to review. *See, e.g., Respondent's Reply to Petitioner's Objections to Respondent's Response to Show Cause Order* (acknowledging mistakes in the failure to provide an accurate transcript and tapes; apologizing and accepting responsibility for the trouble and inconvenience caused the Court).

The LFUCG's mishaps include multiple inaccurate certifications of a "complete" record. Moreover, even at this juncture, the transcript still omits the last several minutes of the hearing. Petitioner's counsel maintains that the omitted portions of the record includes his objections and attempts to proffer evidence—including evidence on the critical issue of how "simple" the policy was in actuality. Critically, the LFUCG has based its motion for summary judgment, in part, upon the assertion that Overstreet failed to object to certain issues at the hearing, thus precluding the matter from appellate review. Without determining whether the LFUCG's actions were willful, it is clear that the inordinate delay associated with this review is due to the LFUCG's intransigence and mistakes. The LFUCG's actions effectively prevent any meaningful post deprivation court review, and constitute a violation of procedural due process. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 547 (1985); *cf. Buchholtz v. Dugan,* No. 92-6173, 1993 WL 432829, at *2-3. (6th Cir. Oct. 26, 1993). Accordingly, the Commission's decision upholding Overstreet's suspension shall be set aside.

III.CONCLUSION

Accordingly, the Court being fully advised, HEREBY ORDERS

(1) Petitioner's motion for costs [DE #36] is GRANTED. Petitioner is awarded $3,860 from respondent due to the discovery dispute;

(2) Petitioner's motions for summary judgment [DE #57 and DE #74] are GRANTED and the Commission's decision is SET ASIDE;

(3) Petitioner's motion for an extension of time [DE #62] is GRANTED;

(4) Respondent's motion for summary judgment [DE #42] is DENIED;

(5) Petitioner's objections [DE # 55 and DE # 71] are DENIED as MOOT.

(6) Petitioner shall file any motion for reasonable attorney's fees incurred within ten days from date of this judgment. The respondent may then file objections within seven days from the date any motion for attorney's fees is filed.

This 10th day of March, 2003.

/S/

KARL S. FORESTER, CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 01-140-KSF

PHILIP OVERSTREET PLAINTIFF

v. JUDGMENT

LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT CIVIL
SERVICE COMMISSION DEFENDANT

****

In accordance with the Opinion and Order entered contemporaneously with this Judgment, the Court HEREBY ORDERS AND ADJUDGES THAT

(1) Petitioner's motion for costs [DE #36] is GRANTED. Petitioner is awarded $3,860 from respondent due to the discovery dispute;

(2) Petitioner's motions for summary judgment [DE #57 and DE #74] are GRANTED and the Commission's decision is SET ASIDE;

(3) Petitioner shall file any motion for reasonable attorney's fees incurred within ten days from date of this judgment. The respondent may then file objections within seven days from the date any motion for attorney's fees is filed;

(4) This matter is DISMISSED WITH PREJUDICE and STRICKEN from the active docket of this Court.

This 10th day of March, 2003.

/S/
KARL S. FORESTER, CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 01-140-KSF

PHILIP OVERSTREET PLAINTIFF

v. ORDER

LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT CIVIL
SERVICE COMMISSION DEFENDANT

The following motions are before the Court: defendant's motion to alter or amend the judgment [DE #77] and plaintiffs motion for fees and costs [DE #78]. The motions are fully briefed and ripe for review.

MOTION TO ALTER OR AMEND

As an initial matter, Fed. R. Civ. P. 59(e) is not intended to be utilized as a means to relitigate issues that were, or could have been, previously presented to the Court. *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir. 1998); *Kenesaw Bay Indian Community v. Michigan,* 152 F.R.D. 562, 563 (W.D. Mich.), *aff'd,* 11 F.3d 1341 (6th Cir. 1992). The motions by the LFUCG merely repeat arguments previously rejected by the Court or add new theories of argument that could have been presented to the Court. Accordingly, the motion to alter or amend merely reargues the case, and as a procedural matter, is not well-taken.

In the interest of a thorough analysis, however, the Court will proceed to address the substantive points raised by the LFUCG. The argument that the statutory authority for meting out discipline and/or the uniform disciplinary code constitutes a comprehensive and well-defined plan in this

context is non-sensical and distorts the Court's previous holding. Obviously, if the statutory authority for discipline served as the touchstone of the legal analysis, then the LFUCG Civil Service Commission could never be found to act without a well-defined plan. It is not in dispute that the Civil Service Commission possessed the *power* to discipline Overstreet; however, this action concerns whether the *use* of that power was exercised consistently with Kentucky law and constitutional due process. Based upon the record available, the Court found that as specifically applied to Overstreet, the LFUCG's decision to discipline him was rendered without a comprehensive and well-defined plan for implementing and enforcing the disclosure policy as explained in the Opinion. Moreover, the Court determined that the LFUCG conduct in this action prohibited the Court from conducting a full and adequate review of the disciplinary action, in violation of Overstreet's constitutional rights as set forth in the Opinion.

The LFUCG next attempts, once again, to convince the Court that Overstreet was actually disciplined for insubordination. As set forth in the Court's opinion, the officials in charge of the policy were themselves in disagreement as to what a "properly filled out form" actually constituted. Accordingly, without clear direction, it was impossible for Overstreet to act insubordinate in regard to the form, and the resulting discipline by the LFUCG was premature. Any contrary finding by the Civil Service Commission was without support in the record.[1]

The LFUCG next attempts to excuse the inaccurate record by shifting the burden to the plaintiff to produce a record of the proceedings. At the March 1, 2002 hearing, the Court found that Overstreet made repeated requests to have the transcript certified, at his expense, but was ignored by the

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[1] As demonstrated throughout this case, the Court's review of the record is necessarily limited because it is based upon the certification of an incomplete record by the LFUCG Secretary.

LFUCG.[2] Accordingly, at the March 1, 2002 hearing, the Court ordered the LFUCG Secretary to file the transcript in the record. The LFUCG then chose to ignore this Court's Order in the ensuing months, needlessly adding to the delay and cost of this litigation. The LFUCG's actions effectively prevented the proper application of corrective judicial process. *Compare Myers v. City of Cincinnati,* 934 F.2d 726, 731 (6th Cir. 1991). Accordingly, even if the law somehow required Overstreet to file the transcript despite the LFUCG's refusal to cooperate in certifying the record, the judgment in this case is justified as a discovery sanction for the LFUCG's repeated and documented refusal to comply with this Court's Orders.

Finally, despite the LFUCG's dogged insistence upon this action being litigated in federal court due to petitioner's constitutional claims, now that it is presented with the realities of unsuccessful federal constitutional litigation, *i.e.,* an attorney fee and cost petition, it shifts to arguing Kentucky law as a purported basis for denying fees and costs. As emphasized repeatedly by the LFUCG, Overstreet asserted federal constitutional claims as the basis for this Court's jurisdiction. This Court has found that the actions of the LFUCG through its Civil Service Commission violated Overstreet's rights under the United States Constitution. Accordingly, the substance of Overstreet's action proves the elements of 42 U.S.C. § 1983 and as a prevailing party Overstreet is entitled to attorney fees under 42 U.S.C. §1988(b) despite failing to plead or argue Section 1983.[3] *See*

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[2] The mandates of K.R.S. § 67A.290 make it impossible for the petitioner to file the transcript in this matter without the cooperation of the Civil Service Commission Secretary who must certify the record.

[3] In light of the petitioner's federal claims, the state law standard of review of the administrative hearing, discussed in the Opinion, is given content by federal due process standards. The petitioner has set forth a substantial federal

(continued...)

Americans United for Separation of Church & State v. School Dist. of Grand Rapids, 835 F.2d 627, 631 (6th Cir. 1987); *Goss* v. *City of Little Rock, Arkansas,* 151 F. 3d 861,865 (8th Cir. 1998).

MOTION FOR ATTORNEY FEES AND COSTS

Overstreet seeks an award of attorney fees and expense of litigation pursuant to 42 U.S.C. § 1988 as the prevailing party in a civil rights action.

The Sixth Circuit has previously held that, even when no judicial relief is ordered on the plaintiffs behalf, the plaintiff may still be considered a "prevailing party" if the "lawsuit produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment[.]" *Payne v. Bd. ofEduc., Cleveland City Schs.,* 88 F.3d 392, 397 (6th Cir. 1996) (quotation omitted). Pursuant to *Payne,* a plaintiff to recover attorney fees had to show that it was their suit which was the "catalyst" that led to the defendant's change in past practices. *Id.*

The Supreme Court has recently overruled *Payne* and struck down the use of the "catalyst theory" as a permissible basis for an award of attorney fees. *See Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep 't of Health & Human Res.,* 532 U.S. 1004 (2001). In *Buckhannon,* the petitioner sought a declaration that a state law violated the Fair Housing Amendments Act, 42 U.S.C. § 3601 et. seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et. seq. Id.* at 601. While the litigation was pending, the West Virginia state legislature repealed the state law that was the subject of the plaintiffs challenge. *Id.* The District Court then granted the defendants' motion to dismiss the case as moot. *Id.*

The United States Supreme Court ultimately affirmed the

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[3](...continued)
law issue that arises from a common nucleus of operative facts to the state law claim.

District Court and Fourth Circuit's denial of the petitioner's request for attorney fees by rejecting the "catalyst" theory for defining a "prevailing party." *Id.* at 605. *Buckhannon* stated, "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change." *Id.* Consequently, pursuant to *Buckhannon,* to satisfy the prevailing party requirements, there must be a judicially sanctioned change in the parties' legal relationship, whether through an enforceable judgment on the merits or through a court-ordered consent decree. *Id.*. Previous Sixth Circuit law, such as *Owner-Operator Independent Drivers Ass 'n Inc. v. Bissell,* 210 F.3d 595, 597-98 (6th Cir. 2000) (permitting prevailing party status derived from a voluntary change in the defendant's behavior), has been overruled in light *of Buckhannon.*

Here, Overstreet has clearly obtained a favorable ruling on the merits as *Buckhannon* requires for prevailing party status. Although *Buckhannon* involved a petition for attorney fees under statutes other than 42 U.S.C. § 1988 at issue here, the Supreme Court expressly stated that all statutes, including Section 1988, that authorize attorney fees to the "prevailing party" are to be treated consistently. *See Chambers v. Ohio Dep 't of Human Services,* 273 F.3d 690, 693 n.l (6th Cir. 2001) *(citing Buckhannon, 532* U.S. at 1839 n.4); *Former Employees of Motorola Ceramic Products v. United States,* 176 F.Supp.2d 1370, 1373 (Ct. Int'l Trade 2001). Accordingly, Overstreet is a prevailing party and the motion for attorney fees shall be granted. *See supra,* pp 3-4.

The Court in its discretion must determine whether the requested fees are "reasonable" both in terms of the number of hours spent and the hourly rate of compensation. *See, e.g., Hensley v. Echerhart,* 461 U.S. 424 (1983); *Blanchard v. Bergeron, 489 U.S. 87, 96 (1989); Louisville Black Police Officers Organization, Inc. v. City of Louisville,* 700 F.2d 268, 274 (6th Cir. 1983). The plaintiff bears the burden of submitting sufficient evidence to establish a reasonable fee request. *See, e.g., Hensley,* 461 U.S. 424; *Reed v. Rhodes,* 179 F.3d 453, 472 (6th Cir. 1999).

The Sixth Circuit recognizes that an award of attorney fees normally is based on the lodestar method. *See, e.g., U.S. ex rel. Taxpayers Against Fraud v. General Elec. Co.,41* F.3d 1032, 1048 (6th Cir. 1994). This calculation involves "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433. In *U.S. ex rel. Taxpayers Against Fraud,* the panel explained that:

> [t]he uniform application of lodestar equations is preferred over an unpredictable system in which different trial judges devise their own subjective, spontaneous formulas. *See, e.g., Northcross v. Board of Educ.,* 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980). However, the district judge may make modifications to account for unreasonable and excessive hours or when unique circumstances justify adjustments to hourly rates. *Id.* at 636-38.

41F.3d at 1048.

A. Reasonable Hourly Rate

Overstreet seeks compensation for 221.5 hours of work by two attorneys and 22.1 hours of paralegal time in this action at the rate of $200 per hour for the attorneys and $50 per hour for the paralegal. In addition, Overstreet's attorneys seek $1,116.20 in costs and $3,850 in interest, as well as an upward adjustment in the form of a three times multiplier for a total of $136,216 in attorney fees.

A reasonable rate is determined by reference to the marketplace. *Missouri v. Jenkins,* 491 U.S. 274, 285 (1989). The relevant "marketplace" is the Court's territorial jurisdiction and nonlocal attorneys are subject to this local rate. *See, e.g., Adcock-Ladd v. Secretary of Treasury,* 227 F.3d 343, 350 (6th Cir. 2000). This Court has previously determined that hourly rates for litigators in the local marketplace range from less than $100 to more than $250 per hour. *See Dixie Fuel Co. v. Callahan,* 136 F.Supp. 2d 659, 666 (E.D. Ky. 2001). The Court is unaware of any significant alteration of this range in 2003. An important factor in

deriving the specific reasonable rate for a particular attorney within the above range is by comparing the rate that lawyers of comparable skill and experience can reasonably expect to command within the local marketplace. *See, e.g., Adcock-Ladd, 221* F.3d at 350.

Overstreet's attorneys have submitted affidavits wherein $150 was requested as a reasonable attorney fee in 2001. As stated, the Court is unaware of any significant increase in market place rates since 2001; however, the Court has more recently awarded a fee of $160 per hour to a civil rights practitioner with comparable experience to that of Overstreet's attorneys. Accordingly, the Court finds that $160 per hour is a reasonable rate for Overstreet's attorneys.[4]

B. Hours Expended

As an initial matter, the request for use of a multiplier is unfounded as the factors cited go toward establishing a reasonable hourly rate, as opposed to an upward adjustment amount. *See Adock-Ladd v. Secretary of Treasury,* 221 F.3d 343, 349 (6th Cir. 2000). In any event, the legal and factual issues presented were relatively straight-forward and the attorneys have not demonstrated exceptional service justifying a multiplier. The LFUCG objects in a general manner to the fee petition by speculating that some of the hours reflect time from the disciplinary proceeding predating the appeal, and that some hours may reflect time spent on the companion Overstreet case, 00-460-KSF. However, time spent during the administrative hearing is compensable as prefiling work directly related to this action. *See, e.g., Dowdell v. Apopka,* 698 F.2d 1181, 1192 (11th Cir. 1983). Overstreet's attorneys have submitted affidavits as well as a summary of billable time, convincing the Court that the submitted charges are solely for time incurred in the Civil Service Commission action, and that time in which the Court has already awarded compensation in this action has been

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[4] Likewise, the $50 per hour for paralegal time is within the typical local range for paralegal billing.

subtracted from the requested total.

The only other objections pertain to 13.9 hours billed in the preparation of fee requests and to 61.6 hours related to a summary judgment motion. Time spent preparing the fee request petition is compensable. In addition, counsel for plaintiff was forced to review various portions of the record to check for accuracy, as well as review tapes, and the Court is unwilling to hold that the time spent related to the summary judgment motion is unreasonable. However, the affidavits fail to indicate which attorneys worked on particular matters. Thus, the Court is unable to adequately review for duplicative billing and unnecessary time. Accordingly, the Court shall reduce the amount of hours claimed by 20% to account for overlapping services. *Cf. Weisenberger v. Huecker,* 593 F.2d 49, 54 n.12 (6th Cir. 1979); *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714, 715, n.2 (6th Cir. 1978).

Based upon the above, the 221.5 hours of attorney time is reduced by 20%, amounting to 177.2 hours of attorney time billed at $160 per hour. Added to this amount of $28,352 is 22.1 hours of paralegal time at $50 per hour and costs of 1,116.20,[5] resulting in a total of $30,573.20.

The attorney fee award in the context of this action troubles the Court and merits further observation. This is a case in which Overstreet's disciplinary suspension of seven days by the LFUCG was overturned as a violation of due process. In the arena of federal litigation, the legal and factual issues presented were relatively straightforward. Despite the relative simplicity of the case, the litigation has now captured two years and three months of judicial time and resources, in addition to capturing over $30,000 in legal

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[5] The Court awards costs pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920. The Court rejects plaintiffs request to alter the standard procedure for awarding interest.

fees from the local government coffers.[6] The disciplinary suspension could have been overturned early on at a much reduced cost to everyone involved, including the cost of attorney fees.[7] Moreover, cooperation with opposing counsel and prompt compliance with Court orders could have drastically simplified the case and reduced the unfortunate cost to everyone involved.

IV. CONCLUSION

Based on the foregoing, the Court, being otherwise fully advised, HEREBY ORDERS

(1) Defendant's motion to alter or amend the judgment [DE #77] is DENIED;

(2) Plaintiffs motion for attorney fees [DE #78] is GRANTED as set forth above, to the extent that Overstreet's attorneys are awarded $30,573.20 in legal fees from the LFUCG.

This 29/ of May, 2003.

/S/
KARL S. FORESTER, CHIEF JUDGE

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[6] In actuality, this $30,000 figure represents only fees that the LFUCG is ordered to pay to Overstreet's attorneys. By its own admission, the LFUCG has paid its outside counsel an additional $81,986 for legal services rendered in this matter and in the companion Overstreet case, 00-460-KSF.

[7] A settlement agreement could have prevented this Order requiring the LFUCG to pay legal fees to Overstreet's attorneys.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

PHILIP OVERSTREET PLAINTIFF

v. JUDGMENT

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT CIVIL
SERVICE COMMISSION DEFENDANT

In accordance with the Order entered contemporaneously with this Judgment, the Court HEREBY ORDERS AND ADJUDGES THAT

(1) Overstreet's attorneys are awarded $30,573.20 in legal fees from the LFUCG;

(2) This judgment is final and appealable and no just cause for delay exists;

(3) This matter; is STRICKEN from the active docket.

This 29/ of May, 2003.

/S/
KARL S. FORESTER, CHIEF JUDGE

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 01-140-KSF
PHILIP OVERSTREET PETITIONER

v. ORDER

LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT RESPONDENT

This matter is before the Court upon the petitioner's motion to remand to state court and sanction the respondent and its counsel for removing the case [DE #4]. The time has expired for a reply and the motion is ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner employee of the Lexington-Fayette Urban County Government ["LFUCG"] was suspended for his alleged failure to properly execute certain documents. The LFUCG Civil Service Commission ["Commission"], on February 7, 2001, determined that the petitioner's suspension was appropriate. The petitioner filed an appeal March 2, 2001, with the Fayette Circuit Court, for a determination as to whether the Commission's action was arbitrary and capricious under Kentucky law. The respondent filed a response on March 21, 2001, and subsequently filed a notice of removal on March 28, 2001.

The petition in Fayette Circuit Court contains Kentucky state law claims pursuant to K.R.S. 67A.290, requesting a review of the Commission's opinion/order of February 7, 2001. The petitioner also alleges that both the LFUCG and the Commission violated his rights under federal law. Paragraph ten of the petition seeks reversal of the Commission's opinion/order on grounds that both the discipline issued to petitioner by LFUCG and the

Commission's opinion/order affirming the discipline constituted violations of his Fourth Amendment rights under the United States Constitution.

In addition to the allegations that the respondent violated the Fourth Amendment, petitioner also complained in paragraph seven of his petition that the policy under which he was disciplined was unconstitutionally vague and unconstitutional as applied. Moreover, the petitioner complained that the Commission "refused to pass" on the constitutionality of the policy under which the petitioner was disciplined. The petitioner is specifically referring to the Commission's prehearing order of January 25, 2001, in which the Commission declined to review legal and constitutional issues pending in this Court raised in a companion case, *Overstreet, et. al. v. Lexington-Fayette Urban County Government,* United States District Court, Eastern District of Kentucky, Civil Action No. 00-460.

In the companion case brought by the petitioner, he challenged the constitutionality of LFUCG's policy under the Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Moreover, in the companion action, the petitioner filed a motion for a temporary restraining order seeking to restrain LFUCG from disciplining him further for failure to comply with its policy, arguing that the policy constituted an unreasonable search in violation of the Fourth Amendment to the United States Constitution. This Court overruled petitioner's motion for a temporary restraining order, and the petitioner subsequently filed a notice of appeal to the Sixth Circuit Court of Appeals and a motion for an injunction pending appeal. This Court overruled petitioner's motion by way of a December 8, 2000, opinion. The Sixth Circuit Court of Appeals granted the motion in part, enjoining LFUCG from initiating administrative charges for the plaintiffs dismissal during the pendency of the appeal. It is clear that the present case explicitly presents a Fourth Amendment question, and also raises the various federal constitutional challenges to the respondent's policy, as presented in the companion case.

II. ANALYSIS

The respondent's notice of removal requested this Court to assume pendent jurisdiction of the petitioner's state law claims pursuant to 28 U.S.C. § 1441 (c), or alternatively, requested the Court to assume supplemental jurisdiction of state law claims pursuant to 28 U.S.C. § 1367. The petitioner argues that this Court is without subject matter jurisdiction and the respondent's removal of the action was entirely without basis.

A defendant must show that the district court had original jurisdiction over the action in order to invoke removal jurisdiction pursuant to 28 U.S.C. § 1441(a). Removal is permitted for actions "of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States .... without regard to citizenship or residence of the parties." 28 U.S.C. § 1441(b). The district courts have original jurisdiction under the federal question statute over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "It is long settled law that a cause of action arises under federal law only when the plaintiffs well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins, Co. v. Taylor,* 481 U.S. 58, 63 (1987) (citations omitted).

Here, it is clear that the petitioner's complaint raises both state law questions and federal law questions. As stated, the petitioner's state court complaint raises express claims based upon the Fourth Amendment, and at least implicitly raises other federal constitutional claims. It is true, as the petitioner asserts, that the federal constitutional claims were raised by way of a cause of action created by state law, namely, K.R.S. § 67A.290. *Cf. City of Chicago v. Int'l College of Surgeons,* 522 U.S. 156, 164 (1997). However, a federal question exists when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiffs cause of action." *Id.* (quoting *Gully v. First Nat. Bank in Meridian,* 299 U.S. 109, 112 (1936)). The petitioner expressly averred the federal constitutional claim

presented here; thus, regardless of the well-pleaded complaint rule, there is no question that federal law is an essential element of the plaintiff s cause of action.

The petitioner argues that Kentucky law vests exclusive jurisdiction of the stale law claims presented here in the "Circuit Court of the county in which the urban-county government is located ...." *See* K.R.S. § 67A.290(1). Even if the petitioner's argument pertaining to the proper forum for the state law claims when brought alone is correct, Kentucky state law does not purport to limit this Court's removal or supplemental jurisdiction. *See, e.g., Shamrock Oil & Gas Corp: v. Sheets,* 313 U.S. 100, 104 (1941) (holding that removal statute is governed by federal law and intended to be uniform in operation, unaffected by state statutory law defining or characterizing the subject matter or action). When original jurisdiction is established, this Court may exercise supplemental jurisdiction over "other claims that.... form part of the same case or controversy" as that upon which the federal claim is based. *See* 28 U.S.C. § 1367(a). The test for this Court's proper exercise of supplemental jurisdiction is whether the federal and state claims presented "derive from a common nucleus of operative fact." *See United Mute Workers of America v. Gibbs,* 383 U.S. 715, 725 (1966).

It is clear that both the petitioner's federal and state claims derive from the same decision by the respondent to suspend the petitioner. Regardless of any state law limit upon the petitioner's ability to assert the separate state law claims initially in federal court, the petitioner freely chose to assert the above federal claims in state court, sufficient to invoke this Court's original jurisdiction for removal. *See City of Chicago v. Int'l College of Surgeons,* 522 U.S. 156, 164 (1997) ("By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.").

The petitioner erroneously relics upon *Long v. Bando Manufacturing of America, Inc.,* 201 F.3d754 (6th Cir. 2000), to argue that this Court does not have original

jurisdiction over his case sufficient for removal. *Long* involved an analysis of the contours of the federal "arising under" jurisdiction when an express or implied federal claim is not presented. *Long v. Bando Manufacturing of America, Inc.,* 201 F.3d 754, 759 (6th Cir.2000). Specifically, the petitioner confuses *Long's* discussion of whether a state law wrongful termination claim, asserting that a discharge violated federal policy embodied in four federal criminal statutes, involved a substantial and disputed question of federal law sufficient to invoke the district court's "arising under" jurisdiction. *Id.* at 760. As stated, the petitioner's Fourth Amendment claim clearly "arises under the Constitution" and provides a sufficient basis for this Court's original jurisdiction over the petitioner's federal and state law claims. Thus, since the Fourth Amendment and other federal constitutional provisions are squarely implicated, it is unnecessary to analyze pursuant to *Merrell Dow Phar[m]aceuticals, Inc. v. Thompson,* 478 U.S. 804, 805-06 (1986), whether the petitioner's claim involves a "substantial federal question of great federal interest." *See Long,* 201 F.3d 754, 759 (citing *Merrell Dow,* 478 U.S. 804, 808-10 & n.5, 813-14 & nn.11-12).

Finally, the petitioner argues that the respondent has waived its right to remove the case lo federal court because it filed court documents in slate court after the case was removed. Waiver of the right to remove an action must be clear and unequivocal. *See Regis Associates v. Rank Hotels (management) Ltd.,* 894 F.2d 193, 195 (6th Cir. 1990). "[A]ctions which are preliminary and not conclusive in character and which do not actually submit the merits of a claim for a binding decision do not constitute a waiver of the defendant's right to remove ...." *Bedell v. H.R.C. Ltd.,* 522 F.Supp. 732, 738 (E.D.Ky. 1981) (quoting *Beasley v. Union Pacific Railroad Co.,* 497 F.Supp. 213,216 (D.Neb. 1980)).

Here, the respondent's filings in state court of a certified copy of the charges against the petitioner were mandated by Kentucky law and were preliminary in nature, not submitting the merits of the claim for a binding decision. These filings

in no way waived the respondent's right to remove the action. The respondent proceeded to file in state court pursuant to Kentucky law in the event that this Court exercised its discretion in remanding the state law claims to state court. *See* 28 U.S.C. § 1446(4). Pursuant to the above analysis, the Court will presently exercise supplemental jurisdiction over the petitioner's state law claims. However, this Court would not hesitate to exercise its discretion and remand petitioner's state law claims if the federal claims were dismissed.

Accordingly, petitioner's motion to remand and issue sanctions [DE #4] is DENIED.

This 26/ day of November, 2001.

/S/
KARL S. FORESTER, CHIEF JUDGE

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

Philip D. Overstreet PETITIONER

v. NO. _____

Lexington-Fayette Urban County Government
Civil Service Commission RESPONDENT

Serve: Sidney C. Kinkead, Esq., Chairman
LFUCG Civil Service Commission
200 East Main Street
Lexington, Kentucky 40507

PETITION

Comes the Petitioner, PHILIP D. OVERSTREET, [hereinafter "OVERSTREET"], pursuant to Kentucky Revised Statutes §67A.270, and for his Petition against the above-named Respondent, states as follows:

1. The Petitioner is Philip D. Overstreet, Lexington, Kentucky.

2. The Respondent is the Lexington-Fayette Urban County Government Civil Service Commission, 200 East Main Street, Lexington, Kentucky 40507.

3. The basis for the appeal is the Civil Service Commission's failure to make specific findings of fact, and the lack of any substantial evidence to support the findings of fact contained in the final Order. Furthermore, although three votes are required for upholding the action taken by the LFUCG, it is Petitioner's belief that only two votes were cast in favor of the disciplinary action, and that the Commission

inappropriately proceeded without the presence of two of the five Commission members originally involved in Petitioner's appeal.

4. Despite the clear testimony from the Chief Administrative Officer that Mr. Overstreet should not have been disciplined due to the confusion between the Law Department, the managers directly involved, and the Mayor's Office, and that the managers should have met to determine the proper method to execute the document prior to disciplining Petitioner, the Commission still arbitrarily upheld the suspension of the Petitioner.

5. The Commission acted arbitrarily and capriciously inasmuch as the Petitioner was singled out for disciplinary treatment despite the fact that the approximately twenty-five percent (25%) of the workforce that also failed to execute (or properly execute) the form were not disciplined.

6. The Commission arbitrarily and unilaterally enforced a time limitation against Petitioner, failed to keep accurate account of the time actually expended by both parties, and arbitrarily denied Petitioner the right to utilize additional time (which the Commission has repeatedly done for the Government) in which to present his case.

7. The Commission arbitrarily, and entirely against the statutory basis for its creation, refused to pass on whether the policy, as implemented, was appropriate, as well as whether the discipline was constitutional given the lack of discipline to other individuals, the lack of prior notification to the Petitioner, and the vague nature of the policy -- despite clear testimony from Petitioner's supervisor and the Chief Administrative Officer regarding confusion over the policy and whether Petitioner's submission was "properly" filled out.

8. The Petitioner requested the right to proffer additional evidence to the Commission in order to demonstrate the type of testimony that would have been beneficial to Petitioner's defense, but was denied the opportunity to present any such

evidence.

9. The Petitioner exhausted his administrative remedies when the matter was appealed to the Secretary of the Civil Service Commission, and a hearing was held on the matter. A copy of the Commission's Findings of Fact and Conclusions is attached hereto as Exhibit A.

10. The Commission's decision, upholding the unconstitutional actions by the LFUCG, constitutes a further violation of Petitioner's constitutional rights as afforded under the Fourth Amendment to the United States Constitution.

WHEREFORE, Petitioner requests as follows:

1. That the Civil Service Commission's Order be reversed;

2. An award of costs and attorneys' fees herein pursuant to Petitioner's protection of his Civil Rights; and

3. Any and all other relief to which Petitioner may appear entitled.

MORRIS & MORRIS, P.S.C.

By: /s/
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